Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 677

GREGOR MURYN,

Petitioner,

versus

THE NEW YORK CENTRAL RAILROAD CO.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GERALD E. DWYER,
Attorney for Respondent

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Statement of Facts

The accident out of which this cause of action arises occurred about 11 p. m. on August 11, 1953, when a piece of iron pipe was dislodged from an electric transporter and struck the plaintiff-petitioner.

The plaintiff was employed by the defendant as a car inspector. At the time the accident occurred he was standing near an elevator shaft on the south side of a corridor 25 or 30 feet wide which runs east and west below the lower level

of Grand Central Terminal in New York City (6a, 7a). Another employee of the defendant, John L. Roberts, was operating an electric transporter in an easterly direction through the corridor. This transporter was approximately thirty inches wide, and, including the handle, was about eleven feet long. It was operated by the front handle, so that Roberts was walking in front of it (32a).

A photograph of a transporter similar to the one here involved was put in evidence as Plaintiff's Exhibit "4" (31a, 32a, 72a). A photograph showing the general physical layout of the corridor was put in evidence as Plaintiff's Exhibit "7". This photograph does not portray the conditions in the corridor as they were at the time of the accident (39a, 74a).

Roberts, when called as a witness by the plaintiff testified as to the happening of the accident. He said that he had been using the transporter to take a coffin to a platform and load it into the baggage car of a train. In getting the coffin into the baggage car he used a metal pipe about 1½ inches in diameter as a roller (35a). He then placed the pipe on the transporter and started to take the transporter back to the baggage room. As to the placing of the pipe on the transporter, he testified (35a, 36a).

> "Q. After you had unloaded the coffin did you place the pipe back on the transporter? A. I placed the pipe back on the transporter between the two lids and raised up the lid so the pipe will fit inside and keep from falling off the platform.
>
> Q. That pipe then was across the width of the transporter; is that right? A. Across the width, yes, sir.
>
> Q. And how wide was the transporter? A. Oh, let's say about that wide (indicating).
>
> Mr. Gammerman: Would you say that that is about 2½ to 3 feet, Mr. Cusack?
>
> The Witness: That's the front part.

Mr. Cusack: I think that is right.

Q. How far did the pipe protrude on either end, on either side of the transporter? A. About five inches on each side, I believe."

Roberts took elevator 24 from the platform down to the corridor and was proceeding in an easterly direction along the corridor to get to elevator 9 or 10, to go back up to the baggage floor (36a). Elevator shafts 9, 10, 11, 12 and 24 are all located along the south wall of the corridor. Shaft 24 is located furthest to the west, and then east of it in the following order are shafts 12, 11, 10 and 9 (36a). As he was proceeding down the corridor toward shaft 9, an electric truck loaded with mail was standing in the corridor in front of shaft 11 waiting for the elevator (37a). This truck was 3½ or 4 feet wide and 10 or 11 feet long and was protruding out into the corridor (37a). Alongside the opposite or north wall of the corridor to the east of the mail truck, there were two skids loaded with mail (38a). Each skid was about 18 feet long (38a). These skids were not directly opposite the mail truck but were a little to the east of it, so that the transporter would first have to pass the truck and then pass the skids (42a). In passing between them there was a clearance of about 12 inches on either side.

When Roberts was approaching this truck and was about six feet west of it, he saw the plaintiff come out of a door along the north wall of the corridor opposite the elevators. Roberts said that the plaintiff saw him coming with the transporter and stopped near the south wall of the corridor to let the transporter go by (40a, 41a). After Roberts himself had passed between the electric truck and the skids (45a) the transporter ran "too close to the truck" and the pipe caught in the truck and was propelled forward, striking the plaintiff (46a).

Roberts had been working for the defendant as a mail and baggage handler since June 21st, 1950 (30a). He regularly used electric transporters in his work (48a).

POINT I

The charge to the jury fully and fairly covered the issues raised by the proofs.

The Court charged the jury that the case was brought under the Federal Employers Liability Act and that the Act provides that:

> "every railroad shall be liable in damages to any employee suffering injury in the course of his employment where the injury resulted in whole or in part from the negligence of any officer, agent, or employee of such railroad." (57a)

The petitioner contends that the Court should also have told the jury that the Act imposed liability upon a railroad where the injury is caused by reason of "any defect or insufficiency, due to its negligence in its * * * equipment" (Petition, p. 6).

There was no proof of any defect or insufficiency in the transporter. In fact it affirmatively appeared from the testimony of Roberts as to the facts and circumstances surrounding the happening of the accident that no defect or insufficiency in the transporter was involved. Obviously trial counsel for the plaintiff, an attorney of wide experience in the trial of cases under the Federal Employers Liability Act, had no thought that a defect or insufficiency in the transporter was involved since he made no request for a charge on that point.

The only question presented by the evidence was whether or not Roberts' conduct in the use and management of the

transporter measured up to the standard of reasonable care under the circumstances; whether or not he acted as a reasonably prudent man. This issue was submitted in a charge which was eminently fair to the plaintiff.

CONCLUSION

The petition should be denied.

Respectfully submitted,

GERALD E. DWYER,
Attorney for Respondent.